89-684

Supreme Court, U.S.
FILED
OCT 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE SAMPLE, INC.,

Petitioner,

vs.

PENDLETON WOOLEN MILLS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR M. WISEHART
WISEHART & KOCH
Attorneys for Petitioner
25 West 43rd Street
Suite 1114
New York, New York 10036
(212) 730-0044

Of Counsel:
ARTHUR M. WISEHART
RUSSELL G. PELTON

QUESTIONS PRESENTED

The Second Circuit's affirmance of a district court's summary judgment dismissal of an antitrust price-fixing conspiracy complaint presents the following fundamental questions in a much-discussed area of the law:

(1) Whether the Second Circuit's affirmance of a summary judgment decision in an antitrust case based on inferences favoring the moving party, ignoring direct evidence produced by the non-moving party, in conflict with holdings in the Third, Fifth, and Ninth Circuits denying summary judgment based on direct evidence produced by the non-moving party,* violates standards previously establish-

---

*Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc., 826 F.2d 1335 (3d Cir. 1987); Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291 (5th Cir. 1987); McLaughlin v. Liu, 849 F.2d 1205 (9th Cir. 1988).

ed by this Court;

(2) Whether the credibility issues raised by direct evidence controverting defendant's claim of unilateral action required denial of defendant's summary judgment motion under Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986);

(3) Whether state antitrust law issues not been previously decided should be certified to the highest court of the state for decision when that procedure is available, or at least separately addressed on appeal.

The district court's summary judgment decision, which was given only cursory review by the Second Circuit's panel, ignored direct evidence of a conspiracy to violate Section 1 of the Sherman Act and an outstanding Consent Order of the Federal Trade Commission, in conflict with the decisions in the Third, Fifth,

and Ninth Circuits (cited in the footnote above) denying summary judgment when such direct evidence is produced by the non-moving party.

PARTY LIST AND CORPORATE PARENTS

Pursuant to U.S. Sup. Ct. R. 21.1(b) and 28.1, petitioner, The Sample, Inc., states that it has no corporate parents, no subsidiaries not wholly owned, and no affiliates. It seeks review of the decision granting summary judgment as affirmed by the United States Court of Appeals for the Second Circuit.

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	i
PARTY LIST AND CORPORATE PARENTS .	iv
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vii
PETITION FOR A WRIT OF CERTIORARI .	1
OPINIONS BELOW	2
STATEMENT OF THE CASE	4
The Profitability Plan and Direct Evidence of Ancillary Conspiratorial Acts	5
The Credibility Issues Involving Pendleton's Claim of Unilateral Action . . .	9
The Improper Use Of Unsupported Assumptions	14
The Violation of This Court's Guidelines for the Handling of Summary Judgment Motions	18
REASONS FOR GRANTING THE WRIT . . .	21
Direct Evidence of a Price-fixing Conspiracy	23
The Consumer Welfare Antitrust Objective	28

I. THE DECISION BELOW SHOULD BE REVIEWED FOR CONFLICTS WITH THE EVIDENTIARY RULE OF MONSANTO 31

II. THE SECOND CIRCUIT DECISION HAS CREATED A CONFLICT BETWEEN THE CIRCUITS WHICH THIS COURT SHOULD RESOLVE 44

The Second Circuit Decision . . 49

Improper Inferences 54

Plausible Interpretation of Conduct 55

III. CERTIFICATION OF STATE ANTITRUST ISSUES RAISES AN IMPORTANT ISSUE 56

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING THE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC, DATED JULY 28, 1989 . . . . A-1

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING THE JUDGMENT OF THE DISTRICT COURT, DATED JUNE 22, 1989 . . . . . B-1

MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, ISSUED AUGUST 15, 1989 . . . . . C-1

OPINION AND ORDER OF THE HON. LEONARD B. SAND, DATED JANUARY 23, 1989. . . . . D-1

N.Y. CONST. ART. VI, § 3(b)(9) . . . E-1

N.Y. CODE, RULE & REG. 550.17,
22 NYCRR 550.17 . . . . . F-1

EXCERPTS FROM THE PENDLETON
ADVANTAGE BROCHURE G-1

TABLE OF AUTHORITIES

Pages

CASES

Albrecht v. Herald Co.,
390 U.S. 145 (1968) 30

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) . . . ii, 19-21, 45, 47, 48

Anheuser-Busch, Inc. v. Abrams,
71 N.Y.2d. 327, 525 N.Y.S.2d 816,
520 N.E.2d 535 (1988) 60

Arnold Pontiac-GMC, Inc.
v. Budd Baer, Inc.,
826 F.2d 1335 (3d Cir. 1987) . . . . i, 48, 49

Atlantic Richfield Co.
v. USA Petroleum Co., No. 88-1668,
57 U.S.L.W. 3789
(June 5, 1989) 28

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 61

Business Elec. Corp. v. Sharp Elec. Corp., ___U.S.___,
108 S. Ct. 1515 (1988) 31-33

California v. ARC America Corp.,
___ U.S. ___,
109 S. Ct. 1661 (1989) 58

City of Houston v. Hill,
___U.S.___,
107 S. Ct. 2502 (1987) 61, 62

Donahue v. Pendleton Woolen Mills, Inc., 633 F. Supp. 1423 (S.D.N.Y. 1986) 7

Federal Trade Commission v. Cement Institute,
333 U.S. 683 (1948) 23

Gray v. Shell Oil Co.,
469 F.2d 742 (9th Cir. 1972),
cert. denied, 412 U.S. 493 (1973) . . 30

Hanson v. Shell Oil Co.,
541 F.2d 1352 (9th Cir. 1976) 30

In re Pendleton Woolen Mills, Inc.,
94 F.T.C. 229 (1979) 22

Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148 (9th Cir. 1988) 31-34

Lehman Bros. v. Schein,
416 U.S. 386 (1974) 57

Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291 (5th Cir. 1987) . . . . . i, 47, 48

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 42, 43, 49, 55, 56

McLaughlin v. Liu,
849 F.2d 1205 (9th Cir. 1988) . . i, 46, 47, 55

Monsanto Co.
v. Spray-Rite Service Corp.,
465 U.S. 752 (1984) 27, 28, 32, 34, 35, 41, 42

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979) 29

Retail Software Serv., Inc.
v. Lashlee, 71 N.Y.2d 788,
525 N.E.2d 737 (1988) 57

Sample Inc. v. Pendleton Woolen
Mills, Inc., 704 F. Supp 498
(S.D.N.Y. 1989) 2, 20

Simpson v. Union Oil of Calif.,
377 U.S. 13 (1964) 41

United States v. Diebold, Inc.,
369 U.S. 654 (1962) 45

United States v. Socony-Vacuum,
310 U.S. 150 (1940) 41, 43

United States v. Trenton Potteries
Co., 272 U.S. 392 (1927) 43

CONSTITUTION

N.Y. Const. art. VI, § 3(b)(9) . . . 56

STATUTES & RULES

28 U.S.C. § 1254(1) 3

Clayton Act § 4, 15 U.S.C. § 15(a) . 3

Donnelly Act § 1,
N.Y. Gen. Bus. Law § 340(1)
(McKinney's 1988) 3, 59-61

Fed. R. Civ. P. 56 46

N.Y. Code, Rule & Reg. 550.17,
22 NYCRR 550.17 56

Sherman Act § 1, 15 U.S.C. § 1 . ii, 3,
22, 29, 61

OTHER AUTHORITIES

VI P. Areeda, Antitrust Law
§§ 1406-1407 (1986) 40

Counseling Your Client on Horizontal
and Vertical Restraints, 55 Antitrust
L.J. 295 (1986) 42

Givens, Increasing Importance of
State Antitrust Law, in Practice
Commentaries, 19 McKinney's Consol.
Laws of N.Y. § 340, at 519 (1988) . . 61

17A C. Wright, A. Miller &
E. Cooper, Federal Practice
and Procedure: Jurisdiction 2d
§ 4248, at 157 (1988) 56, 57

No. 89-____

In the Supreme Court

of the

United States

THE SAMPLE, INC.,

Petitioner,

v.

PENDLETON WOOLEN MILLS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Sample, Inc. ("Sample"), petitioner, respectfully requests that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Second Circuit filed on June 22, 1989.

OPINIONS BELOW

The unreported decision of the Court of Appeals affirming "substantially for the reasons" given in the district court's opinion the grant of summary judgment dismissing plaintiff's claims involving a resale price maintenance conspiracy appears as Appendix B to this Petition. The district court's opinion is reported at 704 F. Supp 498 (S.D.N.Y. 1989), and appears as Appendix D to this Petition.

JURISDICTION

The Court of Appeals entered its judgment in this case on June 22, 1989. The Court of Appeals denied a timely petition for rehearing with suggestion for rehearing en banc on July 28, 1989 (Appendix A hereto). This Court has jurisdiction to review the judgment by

writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . . ."

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides in relevant part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 340 of the Donnelly Act, N.Y. Gen. Bus. Law § 340(1) (McKinney's 1988), provides in relevant part:

> "Every contract, agreement, arrangement or combination whereby

A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void."

STATEMENT OF THE CASE

The Second Circuit decision here eliminates the possibility of any retail price competition involving the products of Pendleton Woolen Mills, Inc. ("Pendleton") in the Buffalo, New York market.

Sample is a regional retailer with ten stores in the Buffalo area, but Pendleton manufacturers and sells apparel products on a nationwide basis. The price-fixing conspiracy in issue is also nationwide in scope.

Hence, unless review is granted, legitimization of the resale price maintenance scheme here involved will block retail price competition for Pendleton products on a nationwide basis.

The Profitability Plan and Direct Evidence of Ancillary Conspiratorial Acts

The price-fixing conspiracy centers upon the use of a "Profitability Plan"[2] coupled with coercive tactics employed by Pendleton and its sales representatives to obtain the agreement of retail

---

[2]The Profitability Plan, referred to throughout this petition, is located in "The Pendleton Advantage" brochure attached as Appendix G-1, at G-7--G-11.

accounts to Pendleton's resale price maintenance scheme.

Acceptance of and commitment to the Profitability Plan by retailers were actively sought and obtained. Inter alia, this entailed the retailers' commitment or agreement to maintain the "regular" or "keystone" retail prices affixed to the garments by Pendleton before selling them to the retailers (A462).[3]

"Keystone" or "regular" retail prices are twice the wholesale cost paid to a manufacturer by retailers. Thus the markup is 50% of the retail price, and

---

[3]Citations to ("A___") are to the Joint Appendix Volumes I and II filed with the appeal in United States Court of Appeals for the Second Circuit. Citations to ("CA___") are to the Confidential Appendix also filed with the United States Court of Appeals for the Second Circuit.

Citations herein using hyphens are to the appendixes to this Petition.

is so "understood by all in the apparel trade." (D-3, n.1.)

The use of the Profitability Plan to obtain the agreement of retailers was not limited to the arts of persuasion. It was accompanied by coercive side practices not mentioned in the Plan itself. Such acts of coercion were inflicted upon those retailers regarded as discounters by Pendleton and its cooperating sales representatives.

Such coercive practices would never have come to light had not several sales representatives been terminated for refusing to participate in violations of the antitrust law and the applicable FTC Consent Order. See Donahue v. Pendleton Woolen Mills, Inc., 633 F. Supp. 1423 (S.D.N.Y. 1986).

Pendleton's National Womenswear Sales Manager, the author of the Profitability

Plan, did not conceal his motives. His blueprint for coercive action in dealing with price-cutting retailers was made explicit in a speech given before sales representatives and cooperating retailers at a sales meeting in January 1984, when the Profitability Plan was announced.

In it, he said that it was "imperative" that Pendleton's sales management and the commissioned sales representatives in the field "work together . . . and are in agreement" on the scheme of imposing coercive trade restraints on discounting retailers (A548; emphasis added).

The Sales Manager further stated (id.):

> We don't encourage the retailer whose direction is different than ours. In fact, we hold them flat, better yet cut [them] back, or even forego the business entirely. [Emphasis added.]

Sample was one of the victims of this program. Sample had been Pendleton's customer for six years, purchasing more than $250,000 in merchandise when Sample was suddenly terminated without warning in January 1985 (A232). Sample's termination occurred notwithstanding substantial expenses and investments in advertising, staff, and floor space in promoting the Pendleton line which Sample had incurred (A182), and at a time when substantial growth was in prospect (A187). Sample continues to receive requests for the merchandise (A186).

The Credibility Issues Involving Pendleton's Claim of Unilateral Action

Pendleton predictably asserted that its termination of Sample was a completely "unilateral" action based upon the conclusion that its products

were "overdistributed in the Buffalo market area." (A41.)

Sample challenged the credibility of that contention through a showing that included direct evidence.

Pendleton's own contemporaneous sales records are evidence that its claim of "overdistribution in the Buffalo market area" as the underlying motive for terminating Sample was pretextual. The Pendleton sales records show that any overdistribution problem was caused not by Sample but by other Buffalo retailers with much higher volume in Pendleton merchandise (CA63-66).

That "overdistribution" was a pretext is also shown by the contemporaneous tape recording by the Pendleton sales representative responsible for the Sample account. The transcript of the tape recording (produced by Pendleton) indi-

cates that the termination decision was an outgrowth of dissatisfaction with Sample's low retail prices, not a concern about overdistribution (A341-43).

Additional direct evidence attacking the credibility of Pendleton's unilateral action claim was provided by the affidavits of Pendleton sales representatives who were present and active in 1984.

Pendleton chiefly relied upon the affidavit of its National Sales Manager, the same person who announced the Profitability Plan.

That affidavit claims that he had "never met with a retail account or potential account and sought or obtained from any account any assurance, agreement, or commitment that the account would charge any particular retail price

or maintain any level of retail prices for Pendleton products" (A41 ¶ 3).

Directly to the contrary, however, are the affidavits of sales representatives Lee and Priscilla Loveridge. The Loveridge affidavits state that in their presence the National Sales Manager did exactly what he swore under oath he did not do. The Loveridge affidavits set forth the specific circumstances that they witnessed when the National Sales Manager, both sought and obtained price-fixing agreements from retailers (A418, 472-473).

Direct evidence of a price-fixing conspiracy also included the use of an audit procedure by Pendleton to determine whether a retailer's commitment to the Profitability Plan's pricing concepts had been followed. This took the form of systematic collection of infor-

mation regarding the gross margins of retailers on Pendleton merchandise.

A gross margin in the vicinity of 50% for a year would show that the retailer's retail prices consistent with the "keystone" or "regular" price formula. In other words, this is evidence that the retailer had in fact accepted the retail pricing practices requested by sales representatives in requesting commitments to the Profitability Plan.

The gross margin information acquired was then used by Pendleton to determine whether the retailer would be rewarded with allocations of merchandise and preferential price packages as a favored account committed to the price-fixing scheme, or penalized by cut-backs and denial of off-price packages. (A428-30, A269-70.)

The gross margin figures of the favored retailers to whom the Profitability Plan was offered (it was not offered to Sample because it was regarded as a "discounter") thus provided very direct evidence of their acceptance of Pendleton's retail pricing philosophy.

The Improper Use Of Unsupported Assumptions

The district court sought to buttress its decision upon assumptions and inferences that not only are without support in Pendleton's motion papers, but also are directly controverted by the affidavits submitted by the Sample, the non-moving party.

The district court's statement that "Pendleton decided to focus its sales on a fewer number of stores with the range of services it considered necessary for success. Id. The Sample did not pro-

vide such services." (D-5; emphasis added), lacks any support in the record.

Nothing in Pendleton's motion papers supports the underlined statement from the district court's opinion quoted above.

The same paragraph in the district court opinion makes the inference that Pendleton management had determined that its line was most successful in stores that were willing to carry a full array of its products, educate the sales people about Pendleton products, and display the Pendleton line separately from those of other manufacturers.

Contrary to the district court's conjectures, which are notably at variance even from Pendleton's "overdistribution" claim, Sample's showing included personal knowledge affidavits (Hirsch Aff., A314 ¶ 15: " . . . as a retail store,

The Sample compares favorably with its competitors."; Donahue Aff., A237 ¶¶ 15-17: "I know The Sample to be a quality Buffalo retailer having an important market following fully consistent with Pendleton's standards for its retailers.").

Further, Pendleton's computer printout with Pendleton's sales figures shows that Sample's competitors in the Buffalo area were not purchasing the "full array" of Pendleton's products. On the contrary, one had entirely discontinued purchasing the Spring line in 1984, the year before Sample was terminated, and the purchases from Pendleton of another retailer historically had been very erratic. Pendleton did not terminate either account. (CA66.)

The district court's further speculation that Sample had done less in educating its sales people about Pendleton's line, or in displaying its line separately from other products is also supported by nothing in Pendleton's motion papers. (D-5.)

Moreover, an affidavit submitted by an officer of Sample shows that Sample had a department that was almost exclusively devoted to the Pendleton line. (A325-326.)

Similarly, the district court's statement that it is a "business concern" of Pendleton to have higher retail prices so more money will be available for hiring and training employees by retailers to see the product (D-6), lacks any support in the record.

The sole source cited by the district court in support of its statement that

"prior to its termination, Sample had not been entirely successful in its sale of Pendleton products" (D-5) is an angry statement by the President of Sample upon learning of the termination (D-5-6 n.3).

However, countervailing evidence in plaintiff's papers shows that Sample had consistent growth with Pendleton when it became a victim of the "selective selling" tactics advocated by Pendleton's National Sales Manager in conjunction with the implementation and use of the Profitability Plan (A548).

The Violation of This Court's Guidelines for the Handling of Summary Judgment Motions

In view of such direct evidence offered by Sample putting in dispute the credibility of the unilateral action claim of Pendleton, the reliance of the district court on affidavits in granting

summary judgment is contrary to the rule established by Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), that credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.

The inconsistency between the grant of summary judgment herein and Anderson v. Liberty Lobby was not commented upon or discussed by either the district court or the panel of the Court of Appeals for the Second Circuit.

The violation of guidelines given by this Court for the proper handling of summary judgment motions is compounded as shown above by inferences drawn by

the district court that are without any support in the movant's papers, whereas Anderson requires all inferences to be drawn in favor of the non-moving party (477 U.S. at 255).

Such violation was met with only a passing glance, if that, on the appeal to the Second Circuit.

The Second Circuit's affirmance of the grant of summary judgment was issued only two days after the oral argument. The Second Circuit's decision gives no independent consideration to the issues presented on the appeal, but merely states that it was affirming "substantially for the reasons set forth in Judge Sand's opinion reported at 704 F.Supp. 498 (S.D.N.Y. 1989)." (B-2)

The Second Circuit summary order adds that it is neither to be published in the Federal Reporter nor should it be

"cited or otherwise relied upon in unrelated cases before this or any other court." (B-2.)

Sample filed a petition for rehearing with a suggestion for rehearing en banc, contending that the affirmance without explanation of the unsupported and erroneous statements of the district court constituted a nullification of Sample's right of appeal under Anderson v. Liberty Lobby, Inc., supra.

However, without any further explanation, the Second Circuit denied the rehearing petition on July 28, 1989 (A-1).

REASONS FOR GRANTING THE WRIT

The case presented is imbued with the public interest. This is demonstrated not only the fact that the case is based upon direct evidence of a price-fixing conspiracy that is considered to be a per se violation of the antitrust laws,

but also by the violation of a Consent Order entered by the Federal Trade Commission designed to prevent Pendleton from engaging in resale price maintenance activities.[4]

Violation of an FTC Order does not necessarily rise to the level of a Sher-

---

[4]The Consent Order covers resale price maintenance activities. In re Pendleton Woolen Mills, Inc., 94 F.T.C. 229 (1979). Inter alia, it prohibits Pendleton from (94 F.T.C. at 232-33):

> 3. Securing or attempting to secure any promise or assurance from any dealer regarding the resale price at which such dealer will or may advertise or sell any product, or requiring or requesting any dealer to obtain approval from respondent [Pendleton] for any resale price at which such dealer may or will advertise or sell any product.
>
> * * * * *
>
> 6. Terminating or taking any other action to restrict, prevent, or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

man Act Section 1 violation but evidence of its intentional violation may be considered by the jury in weighing Pendleton's motive. See Federal Trade Commission v. Cement Institute, 333 U.S. 683, 693 (1948).

This is especially so when the same evidence also directly controverts the credibility of the "overdistribution" affidavits offered by Pendleton in support of its summary judgment motion.

Direct Evidence of a Price-fixing Conspiracy

Affidavits by Lee Loveridge, his wife, and three other terminated sales representatives have been presented in the this case. (Lee Loveridge, A418-29; Priscilla Loveridge, A472-77; James P. Donahue, A278-88; David L. Fallis, A294-96; Harry J. Thornton, A480-86). They show, on the basis of personal know-

ledge, that Pendleton was actively engaged in a conspiracy to fix retail prices.

This took the form of price-fixing agreements sought and obtained from retailers under the auspices of the "Profitability Plan" coupled with ancillary coercive practices directed at non-cooperating retailers. The scheme was devised and orchestrated by Pendleton's National Sales Manager with the sales representatives acting as his instrumentalities.

The clear understanding among the sales representatives that they were being asked by Bishop to engage in illegal conduct is vividly shown in the transcript of a tape recording of telephone conversations of two of them, Loveridge and O.L. Brown, in January 1984, shortly after the Profitability

Plan was announced by Pendleton's Sales Manager.

The transcript of the tape recording shows that the fact that "federal crime" was considered to be involved, as was the expectation that "people are going to get fined and sent to the slammer" as a result (A443).

The sales representatives recognized that the coercive actions against retailers that they were being asked to take by Pendleton were an adjunct of the Profitability Plan, which they described as "a thinly disguised . . . red herring" (A444).

Brown admitted that Pendleton had required him to cut back nearly fifteen retailers as discounters as part of the "conspiracy to . . . maintain prices." (A445; emphasis added.)

Also on their minds was the fact that one of the two, Brown, not only was a sales representative but also was himself a retailer carrying Pendleton products and, as such, was a co-conspirator.

As Loveridge said to Brown, Brown had "more exposure' because "you have a retail store", to which Brown worriedly replied, "That's right. That's right." (A444.)

The uncontroverted evidence that Brown and certain other sales representatives were themselves retailers with capacity to conspire was entirely disregarded or overlooked by the Second Circuit.

Brown, the retailer, purported to find some solace from the thought that the FTC as then constituted "is kind of loose, loosey-goosey," and that "They

haven't enforced too many of these rules and regulations that were set down a few years ago." (A445.)

However, Loveridge reminded him that "they're all waiting for" this Court's soon-to-be announced decision in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984). (Id.)

The refusal of the courts below to permit this direct evidence to go to the jury, when it directly controverts the self-serving affidavits filed by Pendleton officials in support of its summary judgment motion, can only breed contempt for the law and the legal process. This is so particularly in the case of those sales representatives whose careers were ruined as a result of resisting participation in what they understood to be illegal activity (A278-88).

Such affidavits of sales representatives constitute "direct evidence". The price-fixing agreements which the Loveridges observed Bishop enter into with retailers, contrary to what he says in his affidavit, also are direct evidence.

As shown in Point I below, such direct evidence of a price-fixing conspiracy is required to go to the jury under footnotes 9-12 of this Court's opinion in Monsanto, 465 U.S. at 764-767.

The Consumer Welfare Antitrust Objective

Finally, we note that this Court has granted certiorari and has under review, in Atlantic Richfield Co. v. USA Petroleum Co., No. 88-1668, 57 U.S.L.W. 3789 (June 5, 1989), the question of the vertical fixing of maximum prices.

In contrast, the instant case

involves a scheme for the fixing of higher prices.

The Second Circuit's decision is inconsistent with the principal purpose of the antitrust laws. Higher prices such as those here involved have long been considered "inimical" to consumer welfare, which this Court has identified as the overriding purpose of the Sherman Act. In Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979), the Court quoted with approval Judge (then Professor) Bork's description of the Sherman Act as a "consumer welfare prescription."

The uncontroverted opinion of Sample's expert witness is that the antitrust conspiracy here involved already has cost unsuspecting consumers an extra $30,000,000 in their purchases of Pendleton products. This analysis is based upon gross margin figures that Pendleton

itself developed from co-conspiring retailers.

While suppliers may be permitted to suggest retail prices, the coercive tactics here employed as ancillary to the price-fixing agreements entered into take this case into the zone of trade restraints warranting serious appellate consideration. Albrecht v. Herald Co., 390 U.S. 145, 152-153 (1968); Hanson v. Shell Oil Co., 541 F.2d 1352, 1357 n.4 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977); Gray v. Shell Oil Co., 469 F.2d 742, 747-48 (9th Cir. 1972) , cert. denied, 412 U.S. 493 (1973).

This Court's review of the issues presented by this Petition therefore would be in furtherance of the "consumer welfare" purposes of the antitrust laws.

The cursory review given the district court's decision by the Second Circuit

panel was an abdication of the proper performance of the appellate function that should not be permitted to go unchecked in a case involving such important public policy issues.

I. THE DECISION BELOW SHOULD BE REVIEWED FOR CONFLICTS WITH THE EVIDENTIARY RULE OF MONSANTO

The decision below relies upon a 2-1 Ninth Circuit decision, The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1152 (9th Cir. 1988), which in turn relies on Business Elec. Corp. v. Sharp Elec. Corp., ___U.S.___, 108 S.Ct. 1515 (1988).

However, the opinion in Business Electronics specifically notes the crucial difference (108 S.Ct. at 1524):

> In the present case . . . no agreement on resale price maintenance or on price level, and hence no restraint on alienation, was found by the jury, so the common-law rationale of Dr. Miles

> does not apply. [Emphasis added.]

In other words, the evidence presented in Business Electronics on the issue of agreement had been treated as sufficient to go to jury, the very result that was blocked by the summary judgment granted below.

The Jeanery involved a judgment n.o.v. Obviously, such a Ninth Circuit decision does not modify this Court's decisions in Business Electronics or Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), in both of which the evidence in question was submitted to the jury.

While Business Electronics did not involve a price-fixing agreement, as this Court noted in the concluding paragraph of the majority opinion, Monsanto did.

Further, in Business Electronics the maintenance of after-sale service and repair activities for high technology equipment was a factor of significance, unlike the case in bar or The Jeanery, which involve items of apparel.

In The Jeanery it is noted that "Some dealers sold at keystone; some did not." (849 F.2d at 1160.) In the case at bar, in contrast, the affidavit of the President of Sample states, on the basis of personal observation, that Sample's competitors in the Buffalo market "adhere to keystone retail prices put on the garments by Pendleton (except during prescribed sales periods)." (A174.)

Thus, unlike The Jeanery, the instant case squarely presents a situation in which retail price competition on Pendleton merchandise will have been de-

stroyed in an important market unless review is granted.

The evidence presented by Sample in the instant case is the same kind of evidence that went to the jury in Monsanto. The conflict between the decision below and the evidentiary standards established by Monsanto warrants review of this important issue.

In Monsanto, the importance of "direct evidence of agreements to maintain prices" is emphasized. (465 U.S. at 765; emphasis in original.)

Here, unlike The Jeanery, such direct evidence exists.

In addition to the affidavits of sales representatives discussed above (pp. 23-28), such direct evidence also is found in Pendleton's own documents including the Profitability Plan itself.

The court below recognized the importance of the Profitability Plan but treated it as ambiguous and subject to interpretation.

However, the function of the jury has long included the interpretation of just such ambiguous evidence. This was noted specifically in footnote 11 in Monsanto, which involved the interpretation of a newsletter. The opinion in Monsanto makes it clear that the newsletter was ambiguous and subject to two interpretations. (465 U.S. at 766.) Even though in a subsequent letter Monsanto "disavowed any intent to enter into an agreement on resale prices", the Court emphasized that (465 U.S. at 766-7 n.11):

> The interpretation of these documents and the testimony surrounding them properly was left to the jury.

The direct evidence presented by Sample included not only the Profitability Plan but also "testimony surrounding" the use of the document in the form of personal knowledge affidavits by sales representatives.

Additional direct evidence includes the agreements on prices with retailers made by Pendleton's National Sales Manager in the presence of sales representatives (A418-19; A472-73).

Letters from the National Sales Manager to retailers also constitutes such direct evidence.

Typically, the letters confirm understandings reached by the National Sales Manager in meetings with the retailers. Merchandise allocation plans for the account for the coming year are enclosed as reflecting the discussion, and the letters then refer to the re-

tailer's "commitment" to a Pendleton profitability plan. (CA50.)

The making of the "commitment" of the retailer to "a Pendleton profitability plan" is hinged to the expectation of its becoming "more profitable" for the coming year "by several margin points." This is direct evidence of retail price agreement because the keystone formula is a measure of gross margin as a percentage of the retail price.

In the terminology used, increased profitability "by several gross margin points" therefore translates into an understanding that higher retail prices will be maintained in the oncoming year.

The fact that this commitment was discussed in the same letter that enclosed projected merchandising plans as

discussed with the retailer is evidence that consideration was given for the commitment made.

Nor did the matter stop there. A survey of retailers' gross margin results was made after the first year of the Profitability Plan confirmed that the commitments made by the retailer had been observed in practice.

Pendleton's National Sales Manager exulted in the results in his January 1985 speech to the sales representatives (A430):

> It is interesting to note expected gross margin figures this year on Pendleton at retail. Most years we would be pleased to hear Pendleton gross margin figures from 42% to 47%. This year [i.e., 1984, just after the introduction of the Profitability Plan] is an excellent year - our sharp merchants are reporting above 45% and we have heard as high as 52% maintained [gross margin]. Now that's profitability! [Emphasis added.]

The district court's opinion states that such a rise in gross margins is "not necessarily the result of conspiracy." (D-10 n.6.) But it is submitted that what is "necessarily" so is not the correct standard to be used in evaluating evidence submitted by the non-moving party, in whose favor all inferences are to be made in opposition to a summary judgment motion.

The mistake of the district court, in suggesting that plaintiff was asking the court to make "grand leaps of faith", is clear from the fact that the results of the gross margin survey were not so regarded by Pendleton or its National Sales Manager, who himself made those results a central point of his speech to sales representatives just one year after his Profitability Plan was introduced.

The "leap of faith" inference as applied to the apparel industry of 1984 was directly controverted by the affidavit of a Pendleton sales representative who was a veteran of many years' experience in the apparel industry (A430 ¶ 40):

> Since 1984 was a year of increasing use of promotional and discount retail prices, putting downward pressure on gross margins generally in the apparel industry, the substantial increase of gross margins for Pendleton merchandise in that same year proves that Pendleton had succeeded in obtaining commitments to maintain retail prices at keystone prices from large numbers of its retail accounts through the Profitability Plan.

As indicated by the extended discussion in VI P. Areeda, Antitrust Law §§ 1406-1407 (1986), the collection and use of such gross margin information from retailers squarely fits within the definition of "a concerted facilitating

practice", that constitutes direct evidence of a price-fixing conspiracy.

Further, the existence of its use as part of an enforcement mechanism is direct evidence that controverts the claim of unilateral action which is the defense upon which Pendleton chiefly relies. See United States v. Socony-Vacuum, 310 U.S. 150, 224-225 (1940); Simpson v. Union Oil of Calif., 377 U.S. 13 (1964).

Monsanto was discussed in an antitrust symposium in August 1986 published in the Antitrust Law Journal under the Section of Antitrust Law of the American Bar Association. Two antitrust experts (including Professor Donald F. Turner) were in agreement that the following situation, which fits exactly what was done by sales representatives in implementing Pendleton's Profitability Plan,

constitutes evidence of a price-fixing agreement that would constitute a per se violation under Monsanto:

> MR. WHITING: [S]uppose the supplier announces retail prices and asks the dealer or distributor to acknowledge his approval or acquiescence. I take it, from what you have just said and footnote 9 of Monsanto, that would [add up to an agreement].
>
> MR. TURNER: That's right.

Counseling Your Client on Horizontal and Vertical Restraints, 55 Antitrust L.J. 295, 298 (1986).

This case involves a conspiracy to fix higher, not lower prices, and thus does not present the plausibility issue involved in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), a distinction which the decision below failed to note. Writing for the Court in that case as well as in Monsanto, supra, Justice Powell succinctly commented that "any conspiracy by peti-

tioners to charge higher than competitive prices in the American market ... would indeed violate the Sherman Act." Matsushita, 475 U.S. at 583 (emphasis added), citing United States v. Trenton Potteries Co., 272 U.S. 392 (1927); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

The trend toward cartelization through merger of large department store chains has recently accelerated. Independent pricing therefore is one of the most important competitive strategies available to regional retailers such as Sample not burdened with the higher indirect costs engendered by more layers of administrative flab developed by the behemoths in the field.

Unless the ability of Sample and others like it to engage in local price competition is preserved from anti-com-

petitive strategies such as those embodied in the "Profitability Plan" and attendant practices, higher prices inevitably will be foisted off on the unsuspecting public throughout the United States, contrary to the overriding consumer welfare purpose of the antitrust laws. The Second Circuit's non-citable, perfunctory decision affirming summary judgment therefore well warrants review.

II. THE SECOND CIRCUIT DECISION HAS CREATED A CONFLICT BETWEEN THE CIRCUITS WHICH THIS COURT SHOULD RESOLVE

The direct evidence offered by Sample in opposition to summary judgment put in issue the credibility of the affidavits by Pendleton, the movant. Reliance on the Pendleton affidavits and disregard of such direct evidence submitted by Sample by the courts below in granting summary judgment therefore

raises questions concerning the applicability of Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), to price-fixing cases. Under Anderson, (a) credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge in ruling on a summary judgment motion, (b) all inferences are required to be drawn in favor of the non-moving party. See also United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The Third, Fifth and Ninth Circuits have held that motions for summary judgment should be denied when non-moving party has produced direct evidence under Rule 56.

The Second Circuit has affirmed the grant of a motion for summary judgment by ignoring without comment affidavits

and exhibits produced under Fed. R. Civ. P. 56 showing a combination or conspiracy to fix prices, and improperly giving credibility to inferences that the moving party was acting unilaterally in terminating a retailer.

In McLaughlin v. Liu, 849 F.2d 291 (5th Cir. 1987), the Ninth Circuit reversed the grant of summary judgment, quoting with approval the following statement from prior decision in that Circuit (849 F.2d at 1208):

> [A]t summary judgment the judge must view the evidence in the light most favorable to a non-moving party. If direct evidence produced by the moving party conflicts with the direct evidence produced by the non-moving party the judge must assume the truth of the evidence as set forth by the non-moving party with respect to that fact.
>
> The Court also said,
>
> Inferences must also be drawn in the light most favorable to the non-moving party. [Id.]

The Court further said (849 F.2d at 1209):

> If the non-moving party produces direct evidence of a material fact the Court may not assess the credibility of this evidence nor weigh it against any conflicting evidence presented by the moving party.

The Court cited and relied on Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 245 (1986), stating:

> the evidence of a non-movant is to be believed. . . . Summary judgment can not be justified in the face of such evidence.

In McLaughlin v. Liu, 849 F.2d at 1209, the direct evidence relied on by the Court was a sworn statement by the non-movant party.

The Fifth Circuit in Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291 (5th Cir. 1987), used the same reasoning in reversing a lower court grant of summary judgment on the basis of a sworn

statement by the non-movant party. The Court said (828 F.2d at 294):

> The party opposing a motion for summary judgment with evidence competent under Rule 56 is to be believed; it is for the jury at trial not for the judge of a pre-trial motion to decide whose evidence is more credible. A judge assessing the persuasiveness of evidence presented on a motion for summary judgment may discount such evidence as unspecific or immaterial but not as unbelievable.

The Court also quoted from and adopted as applicable this Court's statement from Anderson v. Liberty Lobby (828 F.2d 294):

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

The Third Circuit in Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc., 826 F.2d

1335 (3d Cir. 1987), again following the same reasoning in reversing the grant of a motion for summary judgment in which the lower court referred to the decision of this Court in Matsushita, 826 F.2d at 1338, saying:

> This case is unlike Matsushita for two reasons each of which alone would require us to reverse the district court's grant of summary judgment. In the first place here plaintiff, unlike the plaintiffs in Matsushita, has produced direct evidence of a conspiracy.

The direct evidence referred to by the Third Circuit was a memorandum written by a representative of the manufacturer describing certain meetings with dealers. This memorandum supported the contention of "concert of action" relevant to the alleged conspiracy.

The Second Circuit Decision

In contrast, the Court of Appeals in the Second Circuit in affirming with

apparently no more than a cursory review of the district court's decision and without issuing its own decision or opinion, adopted the findings of the lower court in granting a motion for summary judgment in an antitrust case. Overlooked or disregarded by both courts were the affidavits and exhibits produced as "direct evidence" by the non-moving party, while also making a number inferences in favor of the manufacturer, the moving party, that were either not supported by any evidence in the record, or were directly controverted by the non-moving party.

Plaintiff, the non-moving party on the summary judgment motion, produced affidavits by sales representatives of defendant who were present at meetings between officers of defendant manufacturer and officers of its dealers or

retailers in which the dealers committed themselves to adhere to certain price fixing arrangements in a plan presented by the manufacturer.

A tape-recorded report by a representative of defendant Pendleton which was produced during the discovery period and described certain plans for action by the manufacturer terminating plaintiff Sample for cutting prices. The tape referred to what was called "a ploy" giving a pretextual reason for such termination. (A341-43.)

Records of speeches given by officers of the manufacturer defendant to its sales representatives referring to a "Profitability Plan" which included ancillary arrangements by which the sales representatives were to obtain price agreements from the retailers and a copy of the Profitability Plan itself which

was to be committed to by the retailers were produced by plaintiff, the non-moving party.

Affidavits submitted by plaintiff, the non-moving party, showed that sales representatives were involved in this scheme as the ones making the arrangements for the most part with the retailers, as discussed above (pp.23-28).

Affidavits submitted by plaintiff non-moving party showed that at least two of such sales representatives also were dealers and retailers themselves in selling the manufacturer's goods which were the subject of the whole scheme.

All of the above constituted "direct evidence" by a non-moving party in opposition to a motion for summary judgment as interpreted by the courts in the Ninth, Fifth, and Third Circuits. With

one exception, all of the above direct evidence presentations by plaintiff in opposition to the motion were completely ignored and at least in any event were disregarded by the district court judge and by the Court of Appeals in its review of the district court's decision. One exception was the "Profitability Plan" which the lower court referred to simply as a sales suggestion by the manufacturer, ignoring, overlooking, or dismissing the further facts produced by plaintiff to the effect that the Profitability Plan was agreed upon by the dealers in committing themselves to the plan including the retail price formula therein, and the actual participation by at least two sales representatives in their capacity as retailers.

The record is clear: the lower court followed by the Second Circuit panel

dismissed, overlooked or ignored, "direct evidence" produced by plaintiff, the non-moving party in deciding the summary judgment motion, in direct conflict with the clear holdings of the Ninth, Fifth and Third Circuits.

Improper Inferences

Further, the lower court affirmed by the Court of Appeals in the Second Circuit inferred certain activities by the defendant moving party which were completely unsupported by any evidence in the record in any form. The defendant had of course presented "overdistribution" as a pretextual reason for terminating Sample as unilateral action.

One example of such inference is the Judge's comment that with respect to certain services that should be provided by dealers. The Court said, "Sample did not provide such services". (D-5.)

The record is completely devoid of any showing of failure by plaintiff Sample to provide such services.

The use of inferences drawn by the district court Judge completely favorable to the moving party and affirmed by the Court of Appeals in the Second Circuit is contrary to the holdings as for example in the Ninth Circuit, McLaughlin v. Liu, supra, stating that "inferences must also be drawn in the light most favorable to the non-moving party."

Plausible Interpretation of Conduct

The Ninth Circuit, in McLaughlin v. Liu, cites and relies upon the holding of the Court in Matsushita, supra, and its treatment of "implausible" evidence (849 F.2d at 1207). Here, however, through affidavits and exhibits plaintiff has shown the plausibility of agreement by the retailers to the retail

price levels committed to under the Profitability Plan is greater profit through higher prices. This case therefore is not one involving implausible evidence. In any event, and in contrast to the Ninth Circuit, the Second Circuit, affirming the lower court, ignored or disregarded this aspect of the decision in Matsushita.

III. CERTIFICATION OF STATE ANTITRUST ISSUES RAISES AN IMPORTANT ISSUE

Certification of issues to the highest state court is "A device that has been invented in the last thirty years and . . . has important implications . . . ." 17A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4248, at 157 (1988).

Such a procedure is available here. N.Y. Const. art. VI, § 3(b)(9); N.Y.

Code, Rule & Reg. 550.17, 22 NYCRR 550.17. (E-1; F-1.)

If the Sherman Act claim is dismissed, then the state law claim under the New York Donnelly Act "may be determinative of the cause", and therefore certifiable under the New York Constitution and Rules as interpreted by the New York Court of Appeals. See Retail Software Serv., Inc. v. Lashlee, 71 N.Y.2d 788, 525 N.E.2d 737 (1988).

The use of certification procedure is not limited to cases involving constitutional issues. See 17A Wright, Miller & Cooper, supra, at 162-163; Lehman Bros. v. Schein, 416 U.S. 386 (1974).

In Lehman Brothers, a Second Circuit decision involving a Florida corporation law was vacated and remanded for consideration of certification to the

Florida Supreme Court on the ground that such a procedure "does in the long run save time, energy, and resources and helps build a cooperative judicial federalism." (416 U.S. at 390-91.)

Consideration of the certification procedure, which was raised before but not addressed by the Second Circuit panel, is particularly appropriate for this case, in view of this Court's recent precedent-setting decision in California v. ARC America Corp., ___U.S.__, 109 S.Ct. 1661 (1989).

California v. ARC America, with its historical analysis of the evolution of the antitrust laws as being "an area traditionally regulated by the States," and therefore not pre-empted by Federal law (109 S.Ct. at 1665), came down while this appeal was pending.

The decision is of great importance because of its applicability in a case in which state remedies for trade restraints may be available when none are provided under federal law.

The New York Donnelly Act (quoted above at 3-4) is no mere shadow of the federal law as its differing language shows: the New York law is not limited to price-fixing agreements, but extends to any "arrangement" that "unlawfully" interferes with "the free exercise of any activity in the conduct of any business" under which trade or commerce "is or maybe restrained." (Emphasis added.)

The expansive scope of the language of the Donnelly Act as declaring "all restraints on trade to be illegal", was recently noted by the New York Court of Appeals, which indicated that the

statute is to be interpreted differently from federal law when "[s]tate policy, differences in the statutory language or the legislative history justify such a result." Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d. 327, 333 n.3, 335, 520 N.E.2d at 538 n.3, 539 (1988).

Only the New York Court of Appeals can provide a definitive answer to the question of whether differences in state policy, etc., justify a result that differs from a decision under the Sherman Act.

Whether resale price maintenance activities occurring within the State of New York that violate the FTC Consent Order quoted above (page 22) are also to be considered an "unlawful" interference with trade under the Donnelly Act is a question of first impression.

Such activities, which included the withholding of special, lower-priced packages from Sample, in retaliation for being a discounter, (A310 ¶ 29), might well be deemed to be a violation of the Donnelly Act, if not the Sherman Act, when the effect is to restrain trade. See Givens, Increasing Importance of State Antitrust Law, in Practice Commentaries, 19 McKinney's Consol. Laws of N.Y. §340, at 519 (1988).

Applicable here is Justice O'Connor's statement in a concurring opinion in Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 510 (1985) (quoted with approval in Justice Powell's separate opinion in City of Houston v. Hill, ____U.S.___, 107 S.Ct. 2502, 2517 (1987)):

> Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to

address questions of state law on certification from a federal court. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 510, 105 S.Ct. 2794, 2805, 86 L.Ed.2d 394 (1985) (O'CONNOR, J., concurring).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Court of Appeals for the Second Circuit.

October 25, 1989

Respectfully submitted,

WISEHART & KOCH

By: Arthur M. Wisehart

Arthur M. Wisehart
(Counsel of Record)

25 West 43d Street, Suite 1114
New York, New York 10036

(212) 730-0044

Attorneys for Petitioner
The Sample, Inc.

APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 28th day of July one thousand nine hundred and eighty-nine.

THE SAMPLE INC.,
Appellant,

-v.-

PENDLETON WOOLEN MILLS, INC.,

Appellee.

Docket No. 89-7182

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant THE SAMPLE INC.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-second day of June, one thousand nine hundred and eighty-nine.

Present:

HONORABLE THOMAS J. MESKILL,

HONORABLE LAWRENCE W. PIERCE,

HONORABLE J. DANIEL MAHONEY,

Circuit Judges.

THE SAMPLE, INC.,

Plaintiff-Appellant,

v.

PENDLETON WOOLEN MILLS, INC.,

Docket No. 89-7182

Defendant-Appellee.

This is an appeal from an Opinion of the United States District Court for the Southern District of New York, Sand, *J.*, which granted Pendleton Woolen Mills, Inc.'s motion for summary judgment and dismissed The Sample, Inc.'s complaint.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of the district court is AFFIRMED substantially for the reasons set forth in Judge Sand's opinion reported at 704 F.Supp. 498 (S.D.N.Y. 1989).

/s/ Thomas J. Meskill, U.S.C.J.
Thomas J. Meskill, U.S.C.J.

/s/ Lawrence W. Pierce, U.S.C.J.
Lawrence W. Pierce, U.S.C.J.

/s/ J. Daniel Mahoney, U.S.C.J.
J. Daniel Mahoney, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-second day of June, one thousand nine hundred and eighty-nine.

Present:

HONORABLE THOMAS J. MESKILL,

HONORABLE LAWRENCE W. PIERCE,

HONORABLE J. DANIEL MAHONEY,

Circuit Judges.

THE SAMPLE, INC.,

Plaintiff-Appellant,

v.

PENDLETON WOOLEN MILLS, INC., Docket No. 89-7182

Defendant-Appellee.

This is an appeal from an Opinion of the United States District Court of the Southern District of New York, Sand, *J.*, which granted Pendleton Woolen Mills, Inc.'s motion for summary judgment and dismissed The Sample, Inc.'s complaint.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

– ISSUED AS MANDATE: August 15, 1989 –

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

THE SAMPLE INC.,

Plaintiff, 86 CIV. 2230 (LBS)
OPINION

– against –

PENDLETON WOOLEN MILLS, INC.,

Defendant.
----------X

January 23, 1989

APPEARANCES:

WISEHART & KOCH
Attorney for Plaintiff
25 West 43rd Street
New York, New York 10036
ARTHUR M. WISEHART, ESQ.
PAULA C. ROWE, ESQ.
KIRK L. BIGELOW, ESQ.
DENNIS O'NEIL COWLING, ESQ.
- Of Counsel -

SCHNADER, HARRISON, SEGAL & LEWIS
Attorneys for Defendant
330 Madison Avenue, 14th Floor
New York, New York 10017
BARRY SIMON, ESQ.
-Of Counsel -

– and –

SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600
1600 Market Street
Philadelphia, Pennsylvania 19103

– and –

SPEARS, LUBERSKY, BLEDSOE, ANDERSON,
YOUNG & HILLIARD
800 Pacific Building
520 S.W. Yamhill Street
Portland, Oregon 97204
WAYNE HILLIARD, ESQ.
MARIANNE SCHIMELFENIG, ESQ.
-Of Counsel-

HONORABLE LEONARD B. SAND, U.S.D.J.

SAND, J.

Plaintiff The Sample Inc. ("The Sample"), a retailer of men's and women's apparel with stores in upper New York State, sued Pendleton Woolen Mills, Inc. ("Pendleton"), a manufacturer of woolen clothing and goods, alleging violations of 15 U.S.C. §§ 1 and 2 ("Sherman Act"), N.Y. Gen. Bus. Law § 340 (McKinney 1988) ("Donnelly Act"), and common law fraud. The case is before this Court now on defendant's motions for summary judgment and to strike affidavits and plaintiff's cross-motion for sanctions.

Facts

Pendleton is known as a manufacturer of quality men's and women's apparel. Pendleton sells its products, which consist mainly of woolen goods, through sales representatives who have exclusive territories throughout the United States. Pendleton sells its goods to several retail stores in the Buffalo area, including Adam, Meldrum & Anderson ("AM & A"), L.L. Berger, Jenss, and Sibley's. Until 1985, The Sample, a retailer with stores in the Buffalo area, had also purchased goods, mainly womenswear, from Pendleton.

On January 3, 1985, C.M. Bishop, III, Pendleton's National Womenswear Sales Manager, advised Maer Bunis, co-owner and chief executive officer of The Sample that Pendleton would no

longer be selling to The Sample. Pendleton claims that the decision was based on Pendleton sales representative Mort Madden's recommendation to Mr. Bishop, III that Pendleton had too many accounts in the Buffalo area. Memorandum in Support of Defendant's Motion for Summary Judgment at 5. Pendleton describes its decision to terminate its account with The Sample as "a unilateral decision," which it made without consulting any of the other accounts in the Buffalo area. *Id.* Pendleton asserts that "the pricing policies of The Sample were not a consideration in the decision to terminate the store as an account." *Id.* at n.3.

The Sample attributes its termination as a Pendleton account to its discount or promotional pricing. The Sample claims that it was terminated in furtherance of a conspiracy that involved both Pendleton sales representatives and other retail stores and through which Pendleton sought to maintain the sale of Pendleton merchandise at "regular" or "keystone" prices.[1] According to The Sample, Pendleton's "Profitability Plan"[2] served as a device by which the Pendleton sales representative could approach the retail store and elicit an agreement to sell Pendleton merchandise at keystone prices. Plaintiff's Memorandum of Law in Opposition to Defendants Motion for Summary Judgment at 9. The Sample asserts that because it sold below keystone price, it received from Pendleton less popular lines of clothing and fewer "off-price" deals than "traditional" retailers willing to sell at keystone prices, until finally, it was terminated as a Pendleton account. After termination, The Sample filed this suit and charged Pendleton with violations of state and federal antitrust laws and common law fraud.

---

[1] Keystone pricing is "understood by all in the apparel trade to mean a markup of 50% of the retail price, or twice the wholesale cost." Plaintiff's Appendix ("App.") at 15 (Aff't of Maer Bunis ¶ 30) (Sept. 7, 1988).

[2] The Profitability Plan, which will be discussed *infra* at pp. 9-10, is contained in the Pendleton Advantage, a book provided by Pendleton to its sales representatives and retailers. The book describes the Pendleton philosophy and offers advice on the best way to market Pendleton products.

Discussion

At the center of the dispute between Pendleton and The Sample is The Sample's charge that Pendleton violated § 1 of the Sherman Act. Section 1 makes illegal "[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. The existence of a "contract, combination, or conspiracy" is a prerequisite for a section 1 claim. *H.L. Hayden Co. v. Siemens Medical Systems*, 672 F. Supp. 724, 731 (S.D.N.Y. 1987).

A "contract, combination or conspiracy" requires "concerted action of more than a single entity." *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1152 (9th Cir. 1988). Courts distinguish between concerted and independent (unilateral) action; the latter is not unlawful under section 1 of the Sherman Act, whereas the former is regarded as *per se* illegal and subject to treble damages. *Monsanto Co. v. Spray-Rite Service Corp.* 465 U.S. 752, 761 (1984); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

The Supreme Court has explained that the distinction between concerted and independent action is useful because a manufacturer has a right to deal, or refuse to deal, with a distributor, as long as it does so independently. *Monsanto, supra*, 465 U.S. at 761 (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). Similarly, a distributor can decide to conform to a manufacturer's suggested price to avoid termination. To deter such communication about prices between manufacturer and distributor would result in dislocations in the market. Manufacturers need to know about how their products are received and need to develop strategies that will enhance their reception. *Monsanto, supra*, 465 U.S. at 763-64. A plaintiff alleging a vertical price-fixing arrangement must make a showing of concerted action. To require less would " 'inhibit management's exercise of its independent business judgment and emasculate the terms of the statute.' " *Id.* at 764 (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.* 637 F.2d 105, 111 n.2 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)).

The standard for summary judgment places the burden on the moving party, in this case Pendleton, to show that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). Given the threshold question of the existence of a conspiracy, Pendleton must show that the facts alleging a conspiracy are "not susceptible of the interpretation" The Sample sets forth in its complaint. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968). If that burden is met, The Sample must show proof of the conspiracy and that it suffered "cognizable injury" as a result of the conspiracy. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Although inferences must be drawn in favor of the non-moving party, *id.* at 587, the Supreme Court has said that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Id.* at 588. Applying the above standard to the facts of this case, we believe that summary judgment is appropriate.

Pendleton explains its decision to terminate The Sample based upon its Buffalo sales representative's assessment that Pendleton was selling to too many stores in the Buffalo area. Defendant's App. at 25a (Aff't of C.M. Bishop III ¶ 3) (June 13, 1988); Defendant's App. at 33a (Aff't of Mort Madden ¶ 2) (June 9, 1988). Pendleton management had determined that its line was most successful in stores that were willing to carry a full array of its products, educate its salespeople about Pendleton products, and display the Pendleton line separately from those of other manufacturers. Defendant's App. at 142a-43a (The Pendleton Advantage). Accordingly, Pendleton decided to focus its sales on a fewer number of stores that could provide Pendleton with the range of services it considered necessary for success. *Id.* The Sample did not provide such services.

In addition, prior to its termination, The Sample had not been entirely successful in its sale of Pendleton products.[3] As the

---

[3] In fact, when Pendleton notified Maer Bunis of The Sample that its account would be terminated, Bunis wrote a note at the top of the letter: "Shall we thank them or fight them?" The comment reinforces Pendleton's contention

(Footnote continued)

Supreme Court recognized in *Monsanto*, a manufacturer, as part of its marketing strategy, "often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product." *Monsanto Co., supra*, 465 U.S. at 762-63. These are legitimate business concerns for a manufacturer to have.

For The Sample to avoid summary judgment on its price-fixing claim, it must advance sufficient evidence to raise a genuine dispute as to whether Pendleton was involved in a vertical, price-fixing scheme. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289 (1968); *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp.*, 769 F.2d 919, 923 (2d Cir. 1985) (antitrust plaintiff opposing summary judgment motion may not rest on "conclusory assertions of conspiracy" after defendant has provided "substantial evidence supporting a plausible and legitimate explanation of [its] conduct"). The Sample cannot rest on allegations of conspiracy as set forth in its complaint, but must present evidence such that a jury could find "that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). The Sample must show not merely that retailers conformed to Pendleton's suggested prices, but rather that the retailer "communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Monsanto Co., supra*, 465 U.S. at 764 n. 9.

The first hurdle that The Sample must overcome in its effort to provide sufficient evidence for a reasonable jury to infer a conspiracy is to identify the separate entities with which Pendleton is alleged to have conspired. The Sample charges that Pendleton conspired with its sales representatives, but this claim

---

that The Sample had been less successful than it had anticipated in selling the Pendleton line. Defendant's App. at 61a (Bunis Depos.) (Nov. 30, 1987). Mr. Bunis explained that he might have written that comment because The Sample had not been "as profitable as we would like to have been." *Id.* at 59a.

must fail because the sales representatives act as agents for Pendleton, rather than as separate entities. Just as the Supreme Court has said that a parent and its wholly-owned subsidiary cannot be said to conspire for purposes of § 1, *see Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984), and the Second Circuit has said that a manufacturer and its sales agents cannot be said to conspire (assuming the sales agents have limited authority), *see Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1031 n. 5 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979)* so, too, Pendleton and its sales representatives cannot be said to conspire. Pendleton's sales representatives do not set prices for the products or take possession of them. They do not do any more than secure an order for Pendleton products from a retailer. What Judge Neaher said about the alleged conspiracy by the Post in *Person v. New York Post Corp.*, 427 F. Supp. 1297, 1307 (E.D.N.Y.), *aff'd mem.*, 573 F. 2d 1294 (2d Cir. 1977), is equally apt here: "To the extent that plaintiffs' theory of concerted activity is that the Post conspired with its own . . . agents . . ., their § 1 claim may not be maintained, for, as a matter of law, the Post would then be conspiring with itself to perform a single, unilateral act."

The Sample also alleges that Pendleton conspired with other retail stores in the Buffalo area to maintain keystone prices. However, it asks the Court to draw this conclusion from impermissible inferences. In support of its conspiracy claim, The Sample points to the following: sharing of pricing information between Pendleton and traditional retailers in the Buffalo area

---

* According to the Second Circuit, to determine whether principal and agent constitute one or two entities, we need to examine:

> whether the agent performs a function on behalf of his principal other than securing an offer from a buyer for the principal's product; the degree to which the agent is authorized to exercise his discretion concerning the price and terms under which the principal's product is to be sold; and finally whether use of the agent constitutes a separate step in the vertical distribution of the principal's product.

Id.

(Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 35); complaints from traditional retailers about The Sample's discount prices (*id.* at 47); and success in Pendleton's gross margins that could not have been achieved without a conspiracy (*id.* at 49). As the Supreme Court made clear in *Monsanto Co.*, manufacturers have legitimate reasons for sharing information with distributors, *see* 465 U.S. at 762, and evidence of complaints is not sufficient to establish a conspiracy.[5] *Id.* at 763-64; *see H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Reborn Enterprises, Inc. v. Fine Child, Inc.*, 590 F. Supp. 1423, 1438 (S.D.N.Y. 1984), *aff'd*, 754 F.2d 1072 (2d Cir. 1985). Indeed, the Supreme Court advises that "something more than evidence of complaints is needed." *Monsanto Co., supra*, 465 U.S. at 764.

The "something more" that The Sample provides falls under the Supreme Court's heading of "arguably more ambiguous" evidence, and will not, on its own, constitute sufficient evidence of conspiracy. *Id.* at 765. According to the Supreme Court, "there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 768. Neither Pendleton's Profitability Plan nor its successful sales in 1984 prove such direct or circumstantial evidence.

The Pendleton Profitability Plan ("Plan") is intended to assist the retailer in marketing the Pendleton line as successfully as possible. The Plan offers advice to the retailer. For example, it

---

[5] Moreover, The Sample's evidence of complaints is ambiguous at best. There is evidence that complaints were registered with Pendleton, but it is unclear about which stores these complaints were made. Madden recalled initially that "Jenss' complained about Sibley's running a three-day coupon sale. And L.L. Berger complained about Sample running a three-day coupon sale." Plaintiff's App. (Madden Depos. 256-57) (Mar. 27, 1987). However, Madden later said in a supplemental affidavit that he was actually recalling "an L.L. Berger complaint about *Sibley's*, not The Sample." Defendant's Reply App. at 20sa (Madden Aff't ¶ 3) (Oct. 18, 1988).

suggests trying to sell ensembles, ordering a full collection of Pendleton lines, presenting Pendleton separately from other lines, and devoting resources to the training of salespeople. The Plan includes samples of the kind of advertisements that Pendleton provides, as well as an array of aids available to the retail store from Pendleton (display posters, counter cards, and training films). Although The Sample seizes upon this Plan as evidence of a conspiracy, we find such a conclusion to be unsupported. The Sample focuses on the Plan's use of the word "commitment" as evidence of an agreement and on the statement "[a]ll Pendleton customers should be profitable with Pendleton at regular price" as evidence of coercion to sell at keystone price. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 37-38. But as the court said in *Reborn* where the manufacturer was engaged in distributing a suggested retail price list, which is far more explicit about pricing than the Pendleton Plan, "[p]ublication of a suggested retail price list, . . . and voluntary adherence to it by plaintiff's competitors, is insufficient to support a finding of a vertical price fixing conspiracy." *Reborn, supra*, 590 F. Supp. at 1439. Moreover, even if Pendleton were trying to pressure retailers to sell at keystone price, the Pendleton Plan hardly constitutes "coercion," which is the level to which such pressure would have to rise to constitute evidence sufficient to establish a conspiracy. *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 53 (2d Cir. 1980). As the court said in *Reborn*, "exposition, persuasion, argument, or pressure, . . . are alone insufficient to establish coercion." *Reborn, supra*, 590 F. Supp. at 1440.

Even if Pendleton's Plan could be said to constitute coercion, The Sample has nonetheless failed to show any agreement by retailers to abide by keystone prices. As the court said in *The Jeanery, Inc.*, "[a] plaintiff does not establish concerted action . . . merely by proving that the defendant sought agreement. More is required." 849 F.2d at 1160. The Supreme Court explained that "evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Monsanto Co.*,

supra, 465 U.S. at 764 n. 9. The Sample has failed to make such a showing.[6]

The Sample, like the parties alleging conspiracies in *Reborn* and *Burlington Coat Factory*, has failed to produce evidence that would "permit a reasonable jury to find a vertical price-fixing scheme."[7] *Reborn*, *supra*, 590 F. Supp. at 1440. Plaintiff has "patched together a quilt of speculation to support its section 1 claims," *H.L. Hayden*, *supra*, 672 F. Supp. at 740, largely by submitting affidavits, depositions and exhibits of former Pendleton employees who see a conspiracy as responsible for their discharge from the company. Plaintiff has not met its burden, and defendant's motion for summary judgment as to plaintiff's § 1 claim is granted.

The Sample makes a halfhearted attempt to allege a violation of § 2 of the Sherman Act,[8] and as to this claim too, summary judgment is appropriate. Section 2 of the Sherman Act prohibits monopolizing, attempting to monopolize, or conspiring to monopolize any part of interstate trade. 15 U.S.C. § 2.

The Supreme Court has said that a § 2 monopoly requires: monopoly power in the relevant market; and "the willful

---

[6] The Sample also asks the Court to infer a conspiracy based upon "[t]he dramatic rise in the gross margins of cooperating retailers the *first year* the Plan was in effect." Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 35. However, a rise in gross margins is not necessarily the result of a conspiracy. There could be other factors at work. This court, just as the court in *H.L. Hayden*, cannot "make grand leaps of faith. . . .We are not willing to engage in such intellectual gymnastics." 672 F. Supp. at 739.

[7] Having found insufficient evidence that would allow a reasonable jury to infer the existence of a conspiracy, we need not reach the issue of cognizable injury.

[8] The Sample refers to a § 2 claim, without actually pleading it as a separate cause of action in its complaint. *See* Complaint ¶ 33. In *Person*, *supra*, 427 F. Supp. at 1308, the court found a § 2 claim "raised solely by inference" to be "insufficent" and "thus manifestly without merit." In *H.L. Hayden*, *supra*, 672 F. Supp. at 740, the court recognized that the § 2 claim was a "perfunctory add-on in a section 2 refusal-to-deal case" and found the claim to be without merit. We make the same finding here.

acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident[,]" *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), while the Second Circuit has said that an attempt to monopolize claim requires a showing of: anticompetitive or exclusionary conduct; specific intent to monopolize; and a "dangerous probability" that the attempt will be successful. *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 790 (2d Cir.), *cert. denied*, 107 S. Ct. 3188 (1987). The Sample has provided no substantive evidence, either direct or circumstantial, that would lead to a reasonable inference that Pendleton possessed monopoly power or engaged in anticompetitive conduct, had an intent to monopolize, and possessed the relevant market share to succeed. In fact, The Sample makes no claims as to Pendleton's market share, other than to assert that Pendleton is unique and its products constitute the entire market. However, The Sample, like Reborn, " 'bears the burden of proving the boundaries of the relevant market,' yet it has failed even to allege facts which might identify this market." *Reborn, supra*, 590 F. Supp. at 1451 (quoting *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 840 (2d Cir. 1980)); *see also International Distribution Centers, supra*, 812 F.2d at 792 (market share analysis is "essential"). Here, as in *Reborn*, plaintiff has failed to identify evidence from which a reasonable jury might conclude that defendant achieved or attempted to achieve a monopoly in the relevant market, and accordingly, summary judgment is appropriate.

The Sample's allegation of conspiracy to monopolize is also without merit. The Second Circuit has described the " 'essence' " of a § 2 claim of conspiring to monopolize as " 'an agreement entered into with the specific intent of achieving monopoly.' " *Belfiore v. New York Times Co.*, 826 F.2d 177, 183 (2d Cir. 1987) (quoting *Northeastern Telephone Co. V. American Telephone & Telegraph Co.*, 651 F.2d 76, 85 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982)), *cert. denied*, 108 S. Ct. 1030 (1988). The elements of a conspiracy to monopolize are: " '(1) proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of

an overt act in furtherance of the conspiracy.' " *International Distribution Centers, Inc., supra*, 812 F.2d at 795 (quoting *Paralegal Institute, Inc. v. American Bar Ass'n*, 475 F. Supp. 1123, 1132 (E.D.N.Y. 1979)), *aff'd mem.*, 622 F.2d 575 (2d Cir. 1980). The Sample has not provided any additional evidence to sustain its assertion of a conspiracy to monopolize. Apparently, it rests on the evidence it provided to allege a conspiracy to restrain trade, which this court has found insufficient, and it offers no evidence as to intent. *See* Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 58. Accordingly, defendant's motion for summary judgment is granted as to this allegation as well.

In addition to its federal antitrust claims, The Sample alleges violations of the Donnelly Act, N.Y. Gen. Bus. Law § 340, which is the state counterpart to the Sherman Act. Although plaintiffs assert that the Donnelly Act is broad in scope, the threshold showing, as in a § 1 Sherman Act claim, is "evidence of a 'contract, agreement, arrangement, or combination.' " *H.L. Hayden Co. v. Siemens Medical Systems*, 672 F. Supp. 724, 745 (S.D.N.Y. 1987). The Sample has failed to make this threshold showing, and we conclude, as did Judge Goettel in *H.L. Hayden*, that just as plaintiff has not offered evidence sufficient to draw a reasonable inference of conspiracy under the Sherman Act, so too, has plaintiff failed to make the requisite showing under the Donnelly Act. *Id.* Accordingly, defendant's motion for summary judgment as to this claim is granted.[9]

The Sample's final cause of action is one for fraudulent misrepresentation. The Sample claims that Pendleton represented to it that its account "would not be terminated without good cause" Defendant's App. at 12a (Complaint ¶ 38), and that Pendleton would adhere to the terms of the Consent Order that it had entered into with the Federal Trade Commission ("FTC"). *Id.* at ¶ 40.

---

[9] Although this court has already disposed of the federal antitrust claims raised by plaintiff, the state law claim is properly before this Court by virtue of the parties' diversity jurisdiction.

Under New York law, the elements of fraud, each of which must be proven by clear and convincing evidence, are: representation of a material fact, falsity of the representation, scienter, reliance, and injury. *See, e.g. Westbury Small Business Corp. v. Ballarine*, 128 Misc. 2d 469, 489 N.Y.S.2d 815 (Nassau County Sup. Ct. 1985), *aff'd*, 125 A.D.2d 462, 509 N.Y.S.2d 569 (2d Dep't 1986). On defendant's motion for summary judgment, plaintiff has the burden of providing sufficient evidence that would allow a reasonable jury to find, by clear and convincing evidence, that each of the elements of fraud has been met. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions"). The Sample has failed to provide such evidence.

The Sample alleges that it relied upon Pendleton's advertisements about "relationships that last a lifetime" to conclude that its account would not be terminated without good cause. Plaintiff's App. at 1 (Aff't of Maer Bunis ¶ 24) (Sept. 7, 1988).[10] However, Pendleton's advertisements appeared in trade publications two years prior to The Sample's account with Pendleton, and in any case, they fall under the category of "puffing" and cannot be reasonably relied upon as a statement of Pendleton's obligations. *See, e.g., Simon v. Cunard Line Ltd.*, 75 A.D.2d 283, 428 N.Y.S.2d 952 (1st Dep't 1980). In fact, in his deposition, Mr. Bunis, chief executive officer of The Sampler, conceded that Pendleton did not make any such representations to him, or to his knowledge, to anyone else at The Sample. Defendant's App. at 65a-67a (Bunis Depos. 222-24) (Nov. 30, 1987).

The Sample also alleges that it relied on Pendleton's representation that it would adhere to the Consent Order and not discrimination against accounts selling below keystone price. However, even if the Consent Order (Defendent's App. at

---

[10] Other statements that appeared in similar advertisements described Pendleton as: "a place where value still counts"; "a place where people can be counted on"; and "a place where people still take pride." Plaintiff's App. of Exh. at 61, 63, 65.

133a-36a), or the letter Pendleton sent to its retail stores advising them that it would adhere to the Order (Defendent's App. at 42a, 137a), constituted a representation, The Sample has failed to show that that the representation contained in the Order and letter was false at the time it was made; that Pendleton knew it was false; that The Sample relied on this representation and that it suffered injury as a result. In fact, in another deposition, Mr. Bunis admitted that The Sample determined its prices of Pendleton's womenswear based on market conditions, and that it did not change its prices in any way as a result of the Consent Order or letter. Defendant's App. at 53a-55a (Bunis Depos. 21-23) (Feb. 26, 1987). At the very least, The Sample has failed to demonstrate reliance, and its references to a "surreptitious scheme" hardly constitute clear and convincing evidence that would allow a reasonable jury to decide that the representation was false and that Pendleton had knowledge of its falsity. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 65. Accordingly, defendant's motion for summary judgment as to plaintiff's claim of fraudulent misrepresentation is granted.

This case is also before the Court on Pendleton's motion to strike the affidavits and The Sample's cross-motion for sanctions. Pendleton made its motion to strike affidavits "in order to preclude their consideration by the District Court and to prevent waiver of the issue on appeal." Memorandum in Support of Defendant's Motion To Strike Affidavits at 2. However, given this Court's decision to grant Pendleton's motion for summary judgment, we need not consider its motion to strike. After having reviewed all of The Sample's affidavits, (including those objected to by Pendleton), as well as The Sample's other submissions, this Court has found the evidence insufficient to withstand a motion for summary judgment. Accordingly, Pendleton's motion to strike is now academic and does not require a ruling from this Court.

Although the Court need not rule on Pendleton's motion to strike affidavits, The Sample's cross-motion for sanctions, filed in response, is without merit. Pendleton's motion to strike does

not meet the standards for sanctions set forth in Fed. R. Civ. P. 11 or 28 U.S.C. § 1927. Pendleton's motion is neither frivolous nor designed to add unnecessarily to the length or cost of the litigation. Accordingly, The Sample's cross-motion for sanctions is denied.

For all of the reasons stated above, the complaint is dismissed.

SO ORDERED.

Dated: January 23, 1989
New York, New York

/s/Leonard B. Sand

U.D.D.J.

New York Constitution

Article 6

§ 3. [Jurisdiction of court of appeals]

b. Appeals to the court of appeals may be taken in the class of cases hereafter enumerated in this section;

In civil cases and proceedings as follows:

(9) The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New York law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of New York.

Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York (22 NYCRR 550.17)

500.17 Discretionary proceedings to review certified questions from Federal courts and other courts of last resort. (a) Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state, that determinative questions of New York law are involved in a cause pending before it for which there is no controlling precedent of the Court of Appeals, such court may certify the dispositive questions of law to the Court of Appeals.

(b) The certifying court shall prepare a certificate which shall contain the caption of the case, a statement of facts setting forth the nature of the cause and the circumstances out of which the questions of New York law arise, and the questions of New York law, not controlled by precedent, which may be determinative, together with a statement as to why the issue should be addressed in the Court of Appeals at this time.

(c) The certificate, certified by the clerk of the certifying court under its official seal, together with the original or copies of all relevant portions of the record and other papers before the certifying court, as it may direct, shall be filed with the Clerk of the Court of Appeals.

(d) The Court of Appeals, on its own motion, will examine the merits presented by the certified question, first to determine whether to accept the certification, and second, the review procedure to be followed in determining the merits.

(e) The court shall instruct the clerk to request any additional papers which it requires for its review. Time periods for filing of papers and calendaring of any hearings directed by the court shall be on notice given by the clerk of the court.

(f) If the constitutionality of an act of the Legislature of this State affecting the public interet is involved in a certification to which the State of New York or an agency is not a party, the Clerk of the Court of Appeals shall notify the Attorney General in accordance with the provisions of Executive Law, section 71.

(g) When a determination is rendered by the Court of Appeals with respect to the questions certified, it shall be sent by the Clerk of the Court of Appeals to the certifying court.

Historical Note

Sec. rescinded, filed Dec. 12, 1968; new filed Dec. 17, 1985 eff. Jan. 1, 1986.

THE PENDLETON ADVANTAGE

PROLOGUE

This book describes Pendleton as a resource: Pendleton's history, uniqueness, advantages, profitability, timing, advertising support, and presentation.

Researching Pendleton profitability at retail, this book identifies how a retailer can most profitably represent the Pendleton product to their consumer. With resource and retailer working closely together, the consumer's needs can best be met with product and service.

THE PENDLETON STORY

Pendleton today is the product of pioneer heritage. The woolen industry in the Northwest began with the arrival of the first sheep to the Oregon Country in 1843. Here, the early settlers found conditions especially favorable for wool growing and woolen manufacturing.

However, the Pendleton tradition truly began with the arrival in Oregon in 1863 of a young Englishman, Thomas W. Kay, who helped organize the state's second woolen mill at Brownsville, Oregon.

As the country grew, he prospered and built his own mill in 1889 in Salem, Oregon. His daughter, Fanny, who worked with him in the mill, married a Salem merchant, C.P. Bishop bringing together merchandising and manufacturing expertise. This combination formed a background and understanding of the textile and apparel industry reflected through Pendleton's vertical operation today.

In 1909, two grandsons of Thomas Kay, C.M. and R.T. Bishop, purchased an idle facility in Pendleton, Oregon. It had started scouring wool grown in the region in 1895.

The Bishop brothers commenced producing quality bed and Indian blankets. The latter were especially distinctive in vivid colors and intricate designs, inspired by the Indians themselves.

Pendleton, under its new and energetic owners, expanded into other areas, with the addition of new facilities.

In 1912, a fabric mill in Washougal, Washington (across the Columbia River from Portland, Oregon) added a new dimension.

Wool shirts for men in the early 20th century were a utility/price item. Clarence Bishop envisioned a quality man's shirt in fancy patterns which would be a natural product from the fabric of the Washougal mill.

Thus, the Pendleton virgin wool man's shirt evolved in 1924. Other virgin wool garments for men were rapidly added,

expanding into an extensive line of 100% virgin wool men's sportswear. This now includes a wide variety of shirts, jackets, sportcoats, sweaters, slacks, robes, and accessories, and a non-wool Pen West line of quality spring/summer sportswear.

In 1949, sensing a need and an opportunity for a branded virgin wool women's sportswear line, Pendleton introduced its first ladies' line. One garment, the 49'er jacket, captured the attention of women across the country. Its casual, comfortable simplicity met the needs of women who were part of the new move to suburban living. Today, Pendleton offers a completely color-coordinated line of better ready-to-wear sportswear for women. Five major style groups—Misses Country Clothes, Petites, Knockabouts, a Women's large size line, and Miss Pendleton—offer a wide variety of jackets, skirts, pants, coats, dresses, robes, blouses, shirts, sweaters, and accessories. A complete Spring Sophisticates collection of quality non-wool fashions is offered for warm weather wearing.

Pendleton also provides a full range of woolen fabrics, blankets, motor robes, and occasional throws, as well as the Indian blankets which began it all (and which are still sold to the Indian trade).

Pendleton's expansion has reached the point today where the Company owns and operates 14 mills and factories across the country, including the original mill still in Pendleton, Oregon.

Pendleton operates on the "vertical" system of manufacturing, which means it performs every operation in processing, from the raw wool on through the finished product.

The use of the most modern machinery and methods of manufacturing ensures Pendleton's constant quality control and production scheduling of the products of its mills and factories. Oregon's natural advantages of soft, pure water and mild, equable climate complement the production of quality fabrics and garments.

These 100% virgin wool products are exclusively distributed directly tc the consumer through traditional department, specialty, and sporting good stores across the country.

Thus we have the ultimate in industrial integration between the wool producer, the manufacturer, and the direct distributor, each free and independent agents, but interdependent in a common interest of supplying the consumer with quality merchandise of 100% virgin wool.

The natural beauty of the Northwest, the creative spirit and vision of the early pioneers, all reflect an inspiration and continued commitment being carried on today by the fifth generation of the Pendleton Woolen Mills.

THE PENDLETON ADVANTAGES

Corporate Responsibility	Management continuity and hands on involvement.
Business Integrity	Equitable business policies for all retail accounts regardless of size, including pre-ticketing and consistent terms.
Vertical Operation	Assuring quality control from fleece to fashion to store delivery.
Partnership	Commitment to long term relationships and long range planning.
100% Pure Virgin Wool	Product integrity.
Brand Name	Over 75 years of consumer identification with quality.
Price/Value Ratio	Exceptional price-to-value ratio recognized as such by the better consumer. Reputation for honest value.
Exclusivity	Exclusive fabric design and colors.
Product Development	Continually striving to meet the needs of women through lines designed for a variety of activities and figure types including size specialization.
Selectivity	Controlled, responsible distribution.
Communication Support	Strong communications continuity from consistent, well-targeted national advertising campaigns to in-store sales training programs.
Customer Satisfaction	A warranty fully supported by more than a century of experience.

PROFITABILITY PLAN

COMMITMENT

A. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *share Pendleton's long-term commitment to serve the better, quality customer.*

B. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *are willing to work with Pendleton, preplanning merchandise needs.* Since Pendleton is a vertical company, this preplanning helps Pendleton better serve the retail customer's needs and in turn the consumer.

C. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *buy all three seasonal lines.* The continuity of a year-round base builds consumer loyalty, and thus retail profitability.

- The Fall season is the base of Pendleton's business. Early deliveries for Fall can in certain areas be a profitable option especially in those retail situations where sales people keep consumer lists and call their consumers informing them of new Pendleton merchandise.

  Since Holiday merchandise is delivered at peak consumer traffic time, Holiday turn is historically faster than Fall.

  Country Sophisticates is Pendleton's Spring non-wool line which caters to the same Pendleton consumer, but for the Spring season. Many stores take advantage of the December shipping schedule for their first Spring deliveries.

D. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *recognize and value Pendleton's selective distribution.*

MERCHANDISING

A. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *buy Pendleton for its variety of offering*. Being known for novelties, more so than our competitors, Pendleton is most profitably purchased "wide and shallow" compared to "narrow and deep" in that novelty patterns should not be bought in the same quantities as solids. Pendleton is recognized in the market for its vertical "fleece to fashion" strength in making exclusive, all virgin wool, quality patterns, tweeds, and solids. Pendleton's offprice package system encourages a store to buy Pendleton variety initially since the offprice package assortment can only be absorbed profitably if the packages blend in with the initial stock.

B. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *realize that Pendleton's fabric and styling coordination leads to "ensemble selling"– multiple purchases by consumers.*

C. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *buy the Pendleton Collection of lines*. These retailers capture the widest variety of Pendleton consumers by lifestyle and size. These stores are known as the Pendleton headquarters store in their particular market (Town and Country Clothes, Miss Pendleton, Knockabouts, Petites, Women's Sizes, Talls, Accessories, Coats, and Robes).

D. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *purchase Pendleton's nationally advertised merchandise*. Referrals from Pendleton's Consumer Inquiry department and from the local representative help generate additional sales volume. Retailer listings are also effective. Wool Bureau/retail cooperation in "Wool Bureau cities" helps to complement a retailer's advertising campaign as does Pendleton supplied mail pieces, postcards, statement enclosures, and TV and radio spots.

E. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *schedule deliveries so that fresh receipts are taken in on a continuing basis.* This alleviates the problem of early, heavy inventories and gives the floor a freshness which creates sales and consumer excitement. Spaced deliveries increase turn.

F. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *purchase offprice packages.* All Pendleton customers should be profitable with Pendleton at regular price. Offprice purchases should make an already profitable situation more profitable. The profit advantage of Pendleton's package system is that the assortment is sold to the retailer at 45% off. Pendleton's most profitable customers merchandise packages at the regular marking along with the rest of their stock through the Christmas season. Packages are designed as a "*margin builder*" for our customers. At suggested retail, a store achieves a markup of 72% on offprice merchandise sold.

Package quantities are not predictable from year to year. They consist of exactly what is not sold at regular wholesale price. By not manufacturing *planned* offprice, Pendleton's pricing structure is not burdened by the cost impact and overhead of planned offprice inventories.

While assorted, packages are profitably absorbed into the stocks of those retailers who have bought a wide variety at wholesale. The assortments should be coordinated either in the customer's distribution center or Pendleton can ship the packages by color group to specific branches. For instance, all tartans in the packages should be sent to those stores where the initial tartan stocks were consolidated. This should be done for each color group.

Pendleton's package system is unique in the market. Pendleton sells all its remaining merchandise to the customer at the customer's gain. Thus, there is no need for Pendleton to add alternate distribution channels to sell its leftover goods.

G. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *purchase Januaries.* Januaries being a "cut up" of leftover fabric, gives the retailer the advantage of a specific style with a predetermined size range in a variety of fabrics at approximately one-third off. Unlike packages "margin incentive," Januaries are designed as a fast-turn traffic builder. Adding Januaries to an after-Christmas Pendleton clearance, builds favorable volume for an end-of-the-year "clean-up" sale.

PRESENTATION

A. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *create a Pendleton identity on their selling floor* with fabric (supplied by Pendleton) for backdrops and signing. Pendleton enjoys the advantage of having a rich history and identification as a vertical 100% virgin wool resource associated with quality. Creative in-store merchandising can effectively convey this romantic identity which is unique to Pendleton.

B. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *consolidate Fall stocks* to prevent an overassortment of odds and ends as stocks sell down and the rate of sale slows. Because of Pendleton's quality fabrics and workmanship, Pendleton enjoys a longer selling life than its competitors. Consolidation results in continued selling.

C. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *maximize Pendleton's gift-giving presence in November and December.* Even though Fall sell-through slows prior to consolidation, Pendleton, more so than its competitors, enjoys continued selling since numerous male consumers shop for Pendleton Womens-wear outfits for Christmas gifts. (Male customers know and enjoy Pendleton's fine menswear reputation, recognizing the Pendleton label for quality and integrity.) The store, which chooses to do so, enhances its profitability by continuing to offer Pendleton at regular price through the high-traffic Christmas season.

RETAIL FOLLOW THROUGH

A. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *take advantage of Pendleton's "fill-in" service.* Pendleton maintains a toll free reorder number 800-525-4772. Each Pendleton representative is also updated with a weekly availability list. While Pendleton is not known as a reorder house, Pendleton does ship thousands of "fill-ins" each season.

B. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PRPOFITABILITY, *utilize Pendleton's resources in sales training.* Communicating Pendleton's history, identification with wool, and projecting the store's Pendleton goals inspire the store's selling personnel towards further sales achievement.

C. THE STORES WHO HISTORICALLY MAXIMIZE PENDLETON'S PROFITABILITY, *take advantage of their local Pendleton representative's service, advice, consultation, and analysis of the store's retail selling performance.* The Pendleton representative is knowledgeable as to how the most profitable Pendleton businesses are run.